

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MONTE RUSSELL and DANIEL FREEDMAN, on behalf of themselves and others similarly situated,	No. C 07-3993 CW
Plaintiffs,	ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND
v.	GRANTING IN PART AND DENYING IN PART
WELLS FARGO AND COMPANY and WELLS FARGO BANK, N.A.,	PLAINTIFFS' CROSS- MOTION
Defendants.	

Plaintiffs Monte Russell and Daniel Freedman and Defendants Wells Fargo and Company and Wells Fargo Bank, N.A. dispute how to calculate overtime pay when an employer violates the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, by improperly classifying employees as exempt and failing to pay overtime compensation. The parties stipulated to raise three legal issues in their cross-motions for partial summary judgment. The National Employment Lawyers Association (NELA), National Employment Law Project (NELP) and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) filed a brief as amici curiae in opposition to Defendants' motion. Oral argument on the motions was

1 heard on October 8, 2009. Having considered oral argument and all
2 the papers submitted by the parties, the Court DENIES Defendants'
3 motion for partial summary judgment and GRANTS IN PART and DENIES
4 IN PART Plaintiffs' cross-motion for partial summary judgment.

5 BACKGROUND

6 Plaintiffs are former employees of Defendants. Defendants
7 employed Plaintiff Russell as a "PC/LAN Engineer 3" and Plaintiff
8 Friedman as a "PC/LAN Engineer 4." During the relevant period,
9 both were treated as exempt from overtime pay requirements and were
10 therefore not paid for overtime. After Plaintiffs left their jobs,
11 Defendants reclassified the PC/LAN Engineer 3 and PC/LAN Engineer 4
12 positions as non-exempt so that employees in those positions would
13 be entitled to overtime pay.

14 On August 2, 2007, Plaintiffs filed this action alleging
15 various violations of the FLSA and similar California law.
16 Plaintiffs seek, among other remedies, liquidated damages under the
17 FLSA for Defendants' failure to pay overtime during the relevant
18 period. The three legal issues raised in these cross-motions for
19 partial summary judgment are

- 20 1. Whether it is possible to have the required "clear
21 mutual understanding" necessary to compute damages
22 by the fluctuating workweek method (FWW method) in
23 an exempt/non-exempt misclassification case;
- 24 2. Whether the concurrent payment of overtime pay is a
25 required element to compute unpaid overtime by the
26 FWW method, such that the FWW method of overtime
27 calculation cannot be used in an exempt/non-exempt
28 misclassification case; and
3. Whether damages (if any) on the FLSA overtime claim
of an opt-in plaintiff who resides in California or
Connecticut can be computed by the FWW method.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987). The parties agree that there is no factual dispute material to the Court's decision on the stipulated legal questions.

DISCUSSION

I. Statutory and Legal Background

A. Overtime Requirements under the Fair Labor Standards Act

Passed in 1938, the FLSA was intended to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. In a message to Congress concerning the legislation, President Franklin Roosevelt stated,

Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours.

H.R. Rep. 101-260, at 9 (1989), reprinted in 1989 U.S.C.C.A.N. 696, 696-97. The Act was intended to tackle the twin evils of "overwork" and "underpay." Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942).

In pursuit of these ends, the FLSA, among other things, set a

1 maximum number of hours employees may work per week. See 29 U.S.C.
2 § 207. There are exceptions to this general rule. First, an
3 employee may be classified as exempt under 29 U.S.C. § 213; section
4 213 provides that certain classes of employees may work more than
5 forty hours per week without receiving overtime pay. For non-
6 exempt employees, the second exception requires overtime pay: a
7 non-exempt employee may work more than forty hours per week if, for
8 every hour worked over the maximum, the employer compensates the
9 employee "at a rate not less than one and one-half times the
10 regular rate at which he is employed." 29 U.S.C. § 207(a). This
11 higher rate for overtime is intended to apply "financial pressure"
12 on employers to spread employment and to compensate employees "for
13 the burden of a workweek" exceeding forty hours. Overnight Motor,
14 316 U.S. at 578; see also Brennan v. Elmer's Disposal Svc., 510
15 F.2d 84, 87 (9th Cir. 1975). "[T]he economy inherent in avoiding
16 extra pay was expected to have an appreciable effect in the
17 distribution of available work." Overnight Motor, 316 U.S. at 578.

18 B. The Supreme Court's Decision in Overnight Motor

19 Four years after the FLSA was passed, the Supreme Court
20 decided Overnight Motor Transport Company v. Missel. There, an
21 employee brought an action under section 207 against an employer to
22 recover unpaid overtime compensation. 316 U.S. at 574. The
23 employer paid the employee a flat weekly rate, irrespective of how
24 many hours the employee worked; no separate payment was made for
25 overtime hours. Id. The employer took the position that its flat
26 weekly wages were legal because the FLSA only required that its
27 wages comply with section 206's minimum wage requirement, "with
28 overtime pay at time and a half that minimum." Id. at 575.

1 The Court first discussed whether the employee's flat weekly
2 wage could be used as the basis to calculate overtime pay. As
3 noted, section 207 requires overtime pay based upon the employee's
4 "regular rate;" the statute does not state whether this rate must
5 be calculated on an hourly basis, or whether other bases may be
6 used. The Court held that using a fixed weekly rate for
7 fluctuating hours to calculate overtime pay did not violate the
8 FLSA. See Overnight Motor, 316 U.S. at 580 ("No problem is
9 presented in assimilating the computation of overtime for employees
10 under contract for a fixed weekly wage for regular contract hours
11 which are the actual hours worked, to similar computations for
12 employees on hourly rates."). In other words, the employee's fixed
13 weekly wage could be divided by the number of hours actually worked
14 in a week to provide a regular hourly rate that would be the basis
15 for overtime pay. The Court observed that, under this method, "the
16 longer the hours the less the rate and the pay per hour." Id.
17 However, this did not violate the FLSA. Id.

18 The Court also agreed that the plaintiff's flat weekly wage
19 "was sufficiently large to cover both base pay and fifty per cent
20 additional for the hours actually worked over the statutory maximum
21 without violating [29 U.S.C. § 206, the minimum wage requirement]." Id.
22 Id. at 581. Nevertheless, the Court found the compensation
23 arrangement illegal because "there was no contractual limit upon
24 the hours which petitioner could have required respondent to work
25 for the agreed wage, had he seen fit to do so, and no provision for
26 additional pay in the event the hours worked required minimum
27 compensation greater than the fixed wage." Id. Stated another
28 way, although the plaintiff's wage was sufficient to satisfy the

1 minimum wage and compensate him for overtime at time and a half the
 2 minimum wage, the defendant could not be heard to argue, after the
 3 fact, that it had intended to satisfy section 207 in any event.
 4 See id. ("Implication cannot mend a contract so deficient in
 5 complying with the law."). Section 207 required a prospective
 6 agreement on overtime pay.

7 Overnight Motor stated that an employer and employee could
 8 legally agree, in certain circumstances, to a compensation
 9 arrangement where the employee would be paid a flat weekly rate for
 10 fluctuating hours. However, to satisfy section 207, the agreement
 11 must contain a provision for overtime pay and the wage must be
 12 sufficient to satisfy minimum wage requirements and offer a premium
 13 of at least "fifty per cent for the hours actually worked over the
 14 statutory maximum." Id. at 581.

15 C. Department of Labor's Interpretive Rules Clarifying
 16 Overnight Motor

17 In 1968, the Department of Labor (DOL) promulgated 29 C.F.R.
 18 § 778.114, an interpretive rule intended to codify the Supreme
 19 Court's decision in Overnight Motor.¹ See O'Brien v. Town of
 20 Agawam, 350 F.3d 279, 287 n.15 (1st Cir. 2003). The rule offers a
 21 more detailed explanation of the fluctuating work week (FWW) method

22 ¹ Plaintiffs note that these interpretive rules do not have
 23 the force of law. See 33 Fed. Reg. 986 (Jan. 26, 1968) (explaining
 24 that these rules were adopted without notice-and-comment rulemaking
 25 under the Administrative Procedure Act). Defendants go further and
 26 state, "29 C.F.R. § 778.114 sheds no light on the issue before this
 27 court." Defs.' Reply at 4 n.2. Because these rules are the DOL's
 28 long-standing interpretation of the FLSA, the Court accords them
 respect, as required by Skidmore v. Swift & Co., 323 U.S. 134
 (1994). See also Christensen v. Harris County, 529 U.S. 576, 587
 (2000). Further, Ninth Circuit precedent has also relied upon
 these interpretive rules. See, e.g., Oliver v. Mercy Med. Ctr.,
 695 F.2d 379 (9th Cir. 1982) (applying 29 C.F.R. pt. 778 when
 determining the propriety of overtime award under the FLSA).

1 of calculating overtime pay and explains when it may be used. The
2 rule states that overtime hours under the method may be compensated
3 at a premium of one-half the employee's "regular" rate, which in
4 turn may fluctuate on a weekly basis.²

5 An employer who does not satisfy the "legal prerequisites"
6 cannot use the FWW method and compensate employees for overtime at
7 a premium of one-half their fluctuating regular rate. 29 C.F.R.
8 § 778.114(c). One requirement is a "clear mutual understanding of
9 the parties that the fixed salary is compensation (apart from
10 overtime premiums) for the hours worked each workweek, whatever
11 their number, rather than for working 40 hours or some other fixed
12 weekly work period." 29 C.F.R. § 778.114(a). Another is the
13 contemporaneous provision of overtime pay. 29 C.F.R. § 778.114(c)

14
15 ² The section provides, in pertinent part,

16 An employee employed on a salary basis may have
17 hours of work which fluctuate from week to week
18 and the salary may be paid him pursuant to an
19 understanding with his employer that he will
20 receive such fixed amount as straight time pay
21 for whatever hours he is called upon to work in
22 a workweek, whether few or many. Where there
23 is a clear mutual understanding of the parties
24 that the fixed salary is compensation (apart
25 from overtime premiums) for the hours worked
26 each workweek, whatever their number, rather
27 than for working 40 hours or some other fixed
28 weekly work period, such a salary arrangement
is permitted by the Act if the amount of the
salary is sufficient to provide compensation to
the employee at a rate not less than the
applicable minimum wage rate for every hour
worked in those workweeks in which the number
of hours he works is greatest, and if he
receives extra compensation, in addition to
such salary, for all overtime hours worked at a
rate not less than one-half his regular rate of
pay.

29 C.F.R. § 778.114(a).

1 ("Where all the facts indicate that an employee is being paid for
2 his overtime hours at a rate no greater than that which he receives
3 for nonovertime hours, compliance with the Act cannot be rested on
4 any application of the fluctuating workweek overtime formula.");
5 see also Overnight Motor, 316 U.S. at 581. The DOL echoed
6 Overnight Motor, stating that, although the FWW method is lawful
7 under the FLSA, it affords the employee less pay the more the
8 employee works. Id. at 580.

9 As Defendants note, the difference between the FWW method and
10 the traditional time-and-a-half method can result in an employee
11 being paid seventy-one percent less for overtime over a given year.
12 See Defs.' Mem. of P. & A. at 3-4. Amici note that, under the FWW
13 method, the effective overtime hourly rate of an employee working
14 sixty-one hours or more is less than the non-overtime hourly rate
15 of an employee who worked no more than forty hours per week.³

16 No regulation directly addresses whether the FWW method can be
17 used in misclassification cases such as this one. However, on July
18 28, 2008, the DOL issued a notice of proposed rulemaking (NPRM) to
19

20 ³ Amici explain,

21 [A]n employee who earns \$500 per week and works 61 hours
22 effectively makes \$12.30 per overtime hour (\$500 divided
23 by 61 hours for a regular rate of \$8.20, yielding an
24 overtime rate of \$4.10). If the employer were to hire an
25 additional employee who worked 40 hours per week, that
26 employee's effective hourly rate would be \$12.50 (\$500
27 divided by 40 hours). Thus, if the economically rational
28 employer is able to make use of the fluctuating workweek,
it should push its employees to work more than 60 hours a
week (at a marginal rate of \$12.30/hr and lower as the
hours climb) rather than hire new employees (at a
marginal rate of \$12.50/hr regardless of the number of
hours worked).

Br. of Amici Curiae at 9.

1 revise section 778.114. Updating Regulations Issued Under the Fair
2 Labor Standards Act, 73 Fed. Reg. 43,654 (proposed Jul. 28, 2008).

3 The NPRM explained that section 778.114 currently

4 provides that an employer may use the fluctuating
5 workweek method for computing half-time overtime
6 compensation if an employee works fluctuating hours from
7 week to week and receives, pursuant to an understanding
8 with the employer, a fixed salary as straight-time
9 compensation "(apart from overtime premiums)" for
10 whatever hours the employee is called upon to work in a
11 workweek, whether few or many.

12 Id. The NPRM acknowledged that "the fluctuating workweek method
13 has presented challenges to both employers and the courts in
14 applying the current regulations." Id. at 43,662. The proposed
15 rule, in relevant part, omitted the phrase "apart from overtime
16 premiums" in the sentence regarding the "clear mutual
17 understanding" of fixed compensation for fluctuating hours. Id. at
18 43,669. The NPRM was not pursued and the regulation was not
19 changed.

20 Although the regulation was not changed as proposed, the DOL
21 stated in a January 14, 2009 opinion letter that the FWW method
22 could be used to compute overtime compensation retroactively in a
23 misclassification scenario. Wage & Hour Div., U.S. Dep't of Labor,
24 Retroactive Payment of Overtime and the Fluctuating Workweek Method
25 of Payment, Opinion Letter (FLSA2009-3) (2009). In support of its
26 decision, the letter cited Clements v. Serco, Inc., 530 F.3d 1224
27 (10th Cir. 2008), and Valerio v. Putnam Associates, Inc., 173 F.3d
28 35 (1st Cir. 1999), which, as discussed below, offer no analysis.

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1 II. Use of the FWW Method to Calculate Overtime Pay Retroactively
2 Defendants argue that the FWW method can be used to calculate
3 overtime pay retroactively for the purposes of determining damages
4 in an exempt misclassification case. They assert that the FWW
5 method is available when the employer and employee have a clear
6 mutual understanding that a fixed salary will compensate the
7 employee for all hours worked in a week, including those in excess
8 of the FLSA's forty-hour maximum, even if the "understanding" is
9 based on the employer's erroneous premise that the employee is
10 exempt and thus not entitled to overtime pay. Defendants' argument
11 is untenable. The FWW method cannot be used to calculate overtime
12 pay retroactively in a misclassification case.

13 As noted above, section 778.114 contains legal prerequisites,
14 which employers must first satisfy to use the discounted overtime
15 rate available through the FWW method. These prerequisites include
16 (1) a clear mutual understanding that a fixed salary will be paid
17 for fluctuating hours, apart from overtime premiums; and (2) the
18 contemporaneous payment of overtime premiums.

19 When an employee is not exempt and is paid a fixed salary for
20 fluctuating hours, the employer can satisfy these prerequisites.
21 The employer and employee must have a clear mutual understanding of
22 the fixed salary which, by law, must include an understanding that
23 an overtime premium will be paid for any hours worked over the
24 forty-hour-per-week maximum. Because both parties understand that
25 overtime hours will be compensated, overtime pay would be provided
26 contemporaneously.

27 When an employee is treated as exempt from being paid for
28 overtime work, there is neither a clear mutual understanding that

1 overtime will be paid nor a contemporaneous payment of overtime.
2 Thus, when an employee is erroneously classified as exempt and
3 illegally not being paid overtime, neither of these legal
4 prerequisites for use of the FWW method is satisfied.

5 First, an effective clear mutual understanding is absent in
6 misclassification cases. Defendants assert that an employer could
7 have a clear mutual understanding with its employees that the
8 employees would be paid a flat weekly rate for fluctuating hours,
9 including those hours worked in excess of forty, and would not
10 receive overtime pay. Defendants essentially argue that
11 misclassified employees have implicitly agreed not to receive their
12 FLSA entitlement to overtime pay. This would be illegal.
13 Employees cannot agree to waive their right to overtime pay. See
14 Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739-
15 40 (1981).

16 Second, because the employees were erroneously classified as
17 exempt, overtime compensation was not provided contemporaneously.
18 Employers cannot satisfy this requirement, after having been found
19 to violate section 207, by claiming that they had intended to pay
20 overtime; such an after-the-fact provision of overtime compensation
21 was rejected by the Supreme Court in Overnight Motor. See 316 U.S.
22 at 581 (rejecting the employer's attempt to use FWW method where
23 there was "no provision for additional pay in the event the hours
24 worked required minimum compensation greater than the fixed wage").
25 As stated above, 29 C.F.R. § 778.114(c) requires contemporaneous
26 overtime pay: the FWW method cannot be used "where all the facts
27 indicate that an employee is being paid for his overtime hours at a
28 rate no greater than that which he receives for nonovertime hours."

29 C.F.R. § 778.114(c). In a misclassification case, because employees have not been paid overtime premiums, they are compensated for those hours worked more than forty at a rate not greater than the regular rate.

If Defendants' position were adopted, an employer, after being held liable for FLSA violations, would be able unilaterally to choose to pay employees their unpaid overtime premium under the more employer-friendly of the two calculation methods. Given the remedial purpose of the FLSA, it would be incongruous to allow employees, who have been illegally deprived of overtime pay, to be shortchanged further by an employer who opts for the discount accommodation intended for a different situation.

In making its decision here, the Court is "mindful of the directive that the [FLSA] is to be liberally construed to apply to the furthest reaches consistent with Congressional direction." Klem v. County of Santa Clara, 208 F.3d 1085, 1089 (9th Cir. 2000) (quoting Biggs v. Wilson, 1 F.3d 1537, 1539 (9th Cir. 1993)) (quotation marks and alterations omitted).

The Ninth Circuit has not directly addressed the question of whether the FWW method may be used retroactively to compensate employees who have been misclassified as exempt.⁴ In Oliver v.

⁴ In their response to Amici's brief, Defendants cite General Electric Company v. Porter, 208 F.2d 805 (9th Cir. 1953). This case was decided before the DOL promulgated section 778.114 and, therefore, the court had no occasion to consider the DOL's regulation. They also cite Brennan v. Valley Towing Co, Inc., which involved fixed monthly salaries for regular, forty-seven hour workweeks and a compensation plan for hours worked in excess of forty seven. 515 F.2d 100, 103 (9th Cir. 1975). Brennan did not address section 778.114, presumably because it was inapplicable; the facts did not involve a fixed salary for fluctuating hours.

(continued...)

1 Mercy Medical Center, the court concluded that the FWW method could
2 not be used to calculate liquidated damages pursuant to 29 U.S.C.
3 § 216, in part because the plaintiff-employee and the defendant-
4 employer did not agree to a fixed salary covering all hours worked
5 in a week. See 695 F.2d 379, 381 (9th Cir. 1982). Oliver confirms
6 that an employer and employee must, at the least, agree to a fixed
7 salary for fluctuating hours. But its holding does not address
8 whether the FWW method can be applied retrospectively to calculate
9 overtime pay in a misclassification case. To the extent the
10 holding is silent on this point, there is no binding Ninth Circuit
11 precedent.

12 In Bailey v. County of Georgetown, 94 F.3d 152 (4th Cir.
13 1996), non-exempt employees challenged their employer's use of the
14 FWW method to calculate their overtime pay. Instead of
15 compensating overtime at the time-and-a-half rate, the employer
16 opted for the FWW method and paid a one-half time premium based on
17 fluctuating hours. Id. at 153-54. The employees claimed that this
18 was improper, arguing that the FWW method could only apply if it
19 was shown that they "clearly understood the manner in which their
20 overtime pay was being calculated under the plan." Id. at 154.
21 The court disagreed. The Fourth Circuit determined that neither
22 the plain language of the FLSA nor section 778.114 required an
23 understanding on how overtime would be calculated; according to the
24 court, all that section 778.114 requires is a clear mutual
25 understanding of a fixed salary for fluctuating hours. Id. at 156-

27 ⁴(...continued)

28 Further, the case did not involve misclassified workers. Thus,
these cases offer Defendants no support.

1 57. The court provided no additional analysis. And because the
2 case involved non-exempt employees who were paid overtime, the
3 court had no occasion to address whether contemporaneous overtime
4 pay was a requirement.

5 Thus, Bailey did not address remedial payment to misclassified
6 employees. Nonetheless, the First and Tenth Circuits applied its
7 rule to misclassification cases. See, e.g., Clements v. Serco,
8 Inc., 530 F.3d 1224 (10th Cir. 2008); Valerio v. Putnam Associates,
9 173 F.3d 35 (1st Cir. 1999). In Clements and Valerio, the courts
10 held that the FWW method can be used to calculate overtime pay
11 retroactively. But Clements and Valerio merely cite Bailey.
12 Neither provides a substantive analysis or explains why Bailey
13 should apply in the misclassification context. See Clements, 530
14 F.3d at 1230; Valerio, 173 F.3d at 40. The Fourth Circuit
15 similarly applied Bailey's interpretation of section 778.114 in the
16 misclassification context without analysis. See Roy v. County of
17 Lexington, South Carolina, 141 F.3d 533, 547 (4th Cir. 1998). In
18 Blackmon v. Brookshire Grocery Company, the Fifth Circuit applied
19 the FWW method in a misclassification case. 835 F.2d 1135, 1138
20 (5th Cir. 1988). Blackmon, like the other cases above, offers no
21 explanation. See 835 F.2d at 1138-39.

22 District courts outside these circuits have held that the FWW
23 method cannot be used in misclassification cases. In Rainey v.
24 American Forest & Paper Association, the court analyzed section
25 778.114 and found that its requirements include a clear mutual
26 understanding that the employee is entitled to overtime
27 compensation and contemporaneous payment of overtime premiums. 26
28 F. Supp. 2d 82, 99-102 (D.D.C. 1998); see also Hunter v. Sprint

1 Corp., 453 F. Supp. 2d 44, 58-62 (D.D.C. 2006) (discussing
2 application of the FWW method in a misclassification case). Other
3 courts have rejected the use of the FWW method in misclassification
4 cases because there is no contemporaneous payment of overtime
5 compensation in such cases. See, e.g., Cowan v. Treetop Enters.,
6 163 F. Supp. 2d 930, 941 (M.D. Tenn. 2001) (citing Rainey); Scott
7 v. OTS Inc., 2006 WL 870369, *12 (N.D. Ga.) (citing Rainey).

8 Defendants reject many of the other cases cited by Plaintiffs
9 because "they are not in the exemption misclassification context."
10 Defs.' Reply at 12. However, Bailey, the case relied upon by most
11 of the cases cited by Defendants, was likewise not in the exemption
12 misclassification context. Thus, Defendants' argument undermines
13 their reliance on Valerio, Clements and Roy. Accordingly, the
14 Court does not follow Bailey and its progeny: Bailey is not on
15 point, and the cases that rely on it are not persuasive.

16 The Court is similarly unpersuaded by the DOL's January 14
17 letter. Generally, courts must defer to the expertise of an agency
18 in interpreting statutes that Congress charged to administer. See
19 Cent. Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531, 1539-40
20 (9th Cir. 1993) (citing Chevron U.S.A., Inc. v. Nat'l Res. Def.
21 Council, 467 U.S. 837 (1984)). However, opinion letters do not
22 warrant such deference; under Skidmore v. Swift, 323 U.S. 134, 140
23 (1944), they are to be accorded respect, not deference. An opinion
24 letter is entitled to respect to the extent that it has the "power
25 to persuade." See Christensen v. Harris County, 529 U.S. 576, 587
26 (2000).

27 The opinion letter does not explain why the FWW method should
28 be applied retrospectively, despite the plain language of the DOL's

1 long-standing interpretation of the FLSA contained in § 778.114.
2 The letter relies solely upon Clements and Valerio to explain the
3 DOL's new position, and it goes no further to detail why the DOL
4 was departing from its forty-year-old interpretation. Given the
5 DOL's significant change in course, this explanation is
6 insufficient. Further, the DOL's prior abandoned effort to revise
7 § 778.114(a) through notice-and-comment rulemaking, and the timing
8 of the opinion letter's release -- less than one week before a
9 change in the administration -- detract from its persuasiveness.
10 Deferring to the letter "would permit the agency, under the guise
11 of interpreting a regulation, to create de facto a new regulation."
12 Christensen, 529 U.S. at 588. The DOL cannot use the letter to
13 make a substantive regulatory change that would have the force of
14 law. See id. at 587. The letter lacks thoroughness in its
15 explanation and consistency with the DOL's earlier FLSA
16 interpretation. The Court is not persuaded by it. See id. (citing
17 Skidmore, 323 U.S. at 140).

18 Thus, the background and policy of the FLSA, the Supreme
19 Court's decision in Overnight Motor and the DOL's 1968 interpretive
20 rules demonstrate that the FWW method cannot be used to calculate
21 overtime pay retroactively for the purposes of determining damages
22 under the FLSA in a misclassification case. Section 778.114, which
23 the DOL promulgated in light of Overnight Motor, provides legal
24 prerequisites that cannot be satisfied in a misclassification case.

25 CONCLUSION

26 For the foregoing reasons, the Court interprets § 778.114 to
27 restrict application of the FWW method to calculate overtime pay to
28 situations where (1) there is a clear mutual understanding between

1 an employer and employee that the employee will be paid a fixed
2 salary for fluctuating weekly hours but nonetheless receive
3 overtime premiums and (2) overtime is compensated
4 contemporaneously. The Court therefore DENIES Defendants' motion
5 for partial summary judgment and GRANTS Plaintiffs' cross-motion
6 for partial summary judgment on the first and second stipulated
7 legal issues. Based upon these holdings, the Court need not decide
8 the third stipulated issue. Accordingly, the Court DENIES as moot
9 Defendants' and Plaintiffs' motions for partial summary judgment on
10 the third stipulated legal issue.

11 IT IS SO ORDERED.

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13 Dated: November 17, 2009



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CLAUDIA WILKEN
United States District Judge